80-1308

NO.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

NATIVIDAD OCANAS, ET AL

Petitioners

VERSUS

THE UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

That a Plea Agreement once tendered to the trial court pursuant to Rule 11e cannot be modified or withdrawn by either party.

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Opinion of the United States Court of Appeals A-1

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1980
NO.
(5th Cir. CA 79-5561)
NATIVIDAD OCANAS, ET AL
Petitioners

VS.

THE UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Natividad Ocanas, Ramiro Gonzalez Alvarado, Rogelio Jose De La Garza, and Amadeo Uresti Garza, respectfully pray that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on October 14, 1980.

OPINION

The Decision of the United States Court of Appeals for the Fifth Circuit on original submission, by written opinion, affirmed a judgment of conviction of the trial court (A-1), concluding, inter alia, that the Government did not violate Rule 11e FRCP, 18 U.S.C.A., when it (Government) obtained a new indictment on Appellants after plea agreement had been tendered.

STATEMENT OF THE CASE

The Petitioners were first indicted in September 1977, alleging (1) a conspiracy to import and importing

marijuana and (2) a conspiracy to possess and possessing marijuana with intent to distribute, in violation of 18 U.S.C. ss 841(a), 846, 952(a), and 963 (1976). In return for pleas of guilty to the first count (conspiracy to import) in the initial indictment, the Government promised to drop the remaining counts and agreed to a probated sentence. Relying on this promise, all Petitioners tendered guilty pleas, but the trial court did not accept the pleas when first tendered. The court took the pleas under advisement, ordered presentence investigations, and set a date for sentencing. Prior to the date set for sentencing and prior to the trial court's acceptance of the guilty pleas, the Government obtained a superseding indictment and filed a motion to dismiss the original. Record, vol. 1, at 728. The second indictment charged essentially the same offenses as the original indictment but expanded the time period of illegal activity and added some defendants. The trial court subsequently dismissed the first indictment, never having accepted tendered pleas.

REASONS FOR GRANTING THE WRIT

Petitioners' challenge of the superseding indictment is based on the proposition that Santobello sanctions a remedy of dismissal when the Government breaches its plea bargain agreement. *Santobello v. New York* 404 U.S. 257 (S. Ct. 1971). Otherwise, the accused will remain at the mercy of Government prosecutors who may use plea bargain statements to develop further indictments. Further the trial court cannot safely rely on plea bargains, even after they are tendered, if either side is free to modify its respective positions.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the opinion of the U.S. Court of Appeals for the Fifth Circuit on that question alone.

Respectfully submitted,

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BY: /S/ L.Aron Pena
L.Aron Pena

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari was served upon the Assistant United States Attorney, Federal Courthouse Building, Corpus Christi, Texas, by United States Mail on this the 9th day of January, 1981.

L. Aron Pena

APPENDIX

UNITED STATES v. OCANAS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
Natividad OCANAS, Santiago Casiano,
Jr., Ramiro Gonzalez Alvarado,
Rogelio Jose De La Garza and Amadeo
Uresti Garza, Defendants-Appellants.
No. 79-5561.
United States Court of Appeals,
Fifth Circuit
Oct. 14, 1980.

Defendants were convicted in the United States District Court for the Southern District of Texas, James DeAnda, J., on various charges of conspiracy to import marijuana and conspiracy to possess and possession of marijuana and they appealed. The Court of Appeals, Thornberry, Circuit Judge, held that: (1) superseding indictment, which followed the first indictment by less than five months, did not deny defendants their right to a speedy trial, in the absence of a showing that the delay in bringing the superseding indictment caused them substantial prejudice; (2) even if Government secured indictment by using information provided by a coconspirator in violation of defendants' right to counsel, such was no basis for finding the indictment invalid; (3) Government's use in superseding indictment of counts it had agreed to drop in return for defendant's pleas of guilty to charges alleged in first indictment was not a breach of the plea bargain agreement; (4) defendants did not meet their burden of demonstrating the speci-

fic and compelling prejudice necessary for finding that trial court abused its discretion in denying their motion for severance on grounds that other defendants had prior felony convictions which if presented to the jury would prejudice their right to a fair trial; (5) record supported trial court's findings that as to all of defendants except one there was sufficient proof that a conspiracy existed and that defendants were members of the conspiracy to admit hearsay statments of certain coconspirators and, as to the one, trial court's instructions to disregard the hearsay evidence were sufficient to cure any prejudice; (6) evidence was sufficient to sustain defendant's conviction; and (7) trial court properly imposed consecutive sentences for convictions for conspiracy to possess and possession of marijuana.

Judgment affirmed.

1. Criminal Law - - 577.9

Right to speedy trial comes into play only after indictment or arrest. U.S.C.A. Const. Amend. 6

2. Criminal Law - - 577.16(4)

Superseding indictment, which followed the first indictment by less than five months, did not deny defendants their right to speedy trial, in the absence of a showing that delay in bringing the superseding indictment caused them substantial prejudice. U.S.C.A. Const. Amend. 6

3. Grand Jury - - 36.8

Even if Government had used information, obtained during presentence investigation with respect to defendants' attempted guilty pleas to charges alleged in first in-

dictment, in preparing superseding indictment, such use would not have been barred under rule, providing that statements made in connection with a plea are inadmissible in any civil or criminal proceeding against the person who made the plea, since the grand jury proceeding was not an adversary hearing. Fed. Rules Cr. Proc. Rule 11, 18 U.S.C.A.

4. Criminal Law - - 4064

Evidence - - 207(4)

Language of rule, providing that statements made in connection with guilty plea are inadmissible in any civil or criminal proceeding against person who made the plea, contemplates and proscribes the improper use of evidence in a subsequent adversary proceeding, whether civil or criminal. Fed. Rules. Cr. Proc. Rule 11, 18 U.S.C.A.

5. Grand Jury - -1

Grand jury proceeding is not an adversary hearing to determine guilt or innocence of the accused, but an ex parte investigation to determine whether a crime has been committed and whether any criminal proceedings should be instituted against any person.

6. Indictment and Information - - 10.2(2)

Even if Government secured indictment by using information provided by coconspirator in violation of defendants' right to counsel, such was no basis for finding the indictment invalid. U.S.C.A. Const. Amend. 6.

7. Indictment and Information - - 10.2(2,3)

An indictment valid on its face cannot be challenged merely

because the grand jury acted on inadequate or incompetent evidence, or even on information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination. U.S.C.A.Const. Amend. 5.

8. Criminal Law - - 273.1(2)

Under rule dealing with plea bargaining, trial court retains discretion in accepting or rejecting plea bargain. Fed. Rules Cr.Proc. Rule 11, 18 U.S.C.A.

9. Criminal Law - - 273.1(2)

That a plea bargain will result in too light a sentence under the circumstances is a sound reason for trial court's refusal to accept it. Fed. Rules Cr.Proc. Rule 11, 18 U.S.C.A.

10. Criminal Law - - 273.1(2)

Only in unusual circumstances will the rejection of a plea bargain by a trial court be an abuse of discretion. Fed. Rules Cr. Proc. Rule 11, 18 U.S.C.A.

11. Criminal Law - - 273.1(2)

Generally, either the defendant or the prosecutor is entitled to modify its position and even withdraw its consent to plea bargain agreement until the plea is tendered and the bargain as it then exists is accepted by the court. Fed. Rules. Cr. Proc. Rule 11, 18 U.S.C.A.

12. Criminal Law - - 273.1(2)

Government's use in superseding indictment of counts it had agreed to drop in return for defendants' pleas of guilty to charges alleged in first indictment was not breach of the plea bargain agreement, where trial court did not accept defendants'

pleas. Fed.Rules Cr. Proc. Rule 11, 18 U.S.C.A.

13. Criminal Law - - 622(2)

Defendants did not meet their burden of demonstrating the specific and compelling prejudice necessary for finding that trial court abused its discretion in denying their motion for severance on grounds that other defendants had prior felony convictions which if presented to jury would prejudice their right to a fair trial.

14. Criminal Law - - 622(1)

Evidence of prior criminal offenses relating to a codefendant ordinarily will not generate prejudice arising to a level that requires severance.

15. Criminal Law - - 622(2)

Trial court did not abuse its discretion in denying the severance on the grounds that prejudice stemmed from the admission of evidence relating to an offense by defendant, which was extraneous to those for which defendants were indicted.

16. Criminal Law - - 427(3)

Although the preferred order of proof requires a showing of the conspiracy and of defendant's connection with it before admitting declarations of a coconspirator, when the trial court determines that it is not reasonably practical to require the showing before admitting the statements, it may admit them subject to being connected up.

17. Crimimal Law - - 427(5), 1169.5(5)

Record supported trial court's findings that, as to all defendants except one, there was sufficient proof that a

conspiracy existed and that defendants were members of the conspiracy to admit hearsay statements of certain coconspirators and, as to the one, trial court's instructions to disregard the hearsay evidence were sufficient to cure any prejudice.

18. Criminal Law - - 1159.2(7)

Standard of review applicable in determining whether evidence is sufficient to support a conviction is whether a reasonably minded jury must necessarily entertain a reasonable doubt as to the defendant's guilt under the evidence, i.e., the standard is whether reasonable minds could have found the evidence inconsistent with every reasonable hypothesis of the defendant's innocence.

19. Conspiracy - - 47(12)

Evidence was sufficient to sustain defendants' convictions for conspiracy to import marijuana and conspiracy to possess and possessing marijuana with intent to distribute. 18 U.S.C.A. § 2; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a), 406, 1002(a), 1013.

20. Criminal Law - - 1159.2(2)

In reviewing trial court's denial of accused's motion for acquittal based on insufficiency of the evidence, Court of Appeals must determine whether, taking the view most favorable to the Government, the jury could reasonably conclude that the evidence is inconsistent with any hypothesis of the accused's innocence.

21. Conspiracy - - 47(12)

Evidence that defendant was a member of conspiracy was

sufficient to support defendant's conviction for conspiracy to possess marijuana.

22. Drugs and Narcotics - - 65

Mere ownership of vehicle containing contraband is insufficient to constitute constructive possession.

23. Drugs and Narcotics - - 65

Constructive possession need not be exclusive, but may be shared with others, as long as the evidence is such that a jury might reasonably infer that a person charged with constructive possession had dominion and control over the object.

24. Drugs and Narcotics - - 123

Evidence that defendant enjoyed dominion and control over truck containing marijuana was sufficient to sustain his conviction for possessing marijuana.

25. Criminal Law - - 878(4)

There was no inconsistency in defendant's being found not guilty of conspiracy to import, yet guilty of conspiracy to possess and possession of marijuana.

26. Criminal Law - - 878(4)

Even if there is inconsistency in defendant's being found not guilty of one count and yet guilty of another count, if his conviction is supported by the evidence, it may stand.

27. Conspiracy - - 28(1)

Conspiracy and the substantive offense that is the object of the conspiracy are separate and distinct crimes.

28. Criminal Law - - 1210

Trial court properly imposed consecutive sentences for con-

victions for conspiracy to possess and possession of marijuana.

Appeals from the United States District Court for the Southern District of Texas.

Before THORNBERRY, GEE and REAVLEY, Circuit Judges.

THORNBERRY, Circuit Judge:

From at least June 1976 through February 1977, about thirty individuals in Donna, Texas, were involved in importing marijuana from Mexico and distributing it in the United States. The conspirators floated bales of marijuana across the Rio Grande at a farm near Donna, transported them to a rented garage where they hid them in produce trucks, and shipped them to Oklahoma for sale to distributors.

The appellants were first indicted in September 1977. The indictment charged conspiracy to import and importing marijuana, and conspiracy to possess and possessing marijuana with intent to distribute, in violation of 18 U.S.C. § 2 (1976) and 21 U.S.C. §§ 841(a), 846, 952(a), and 963 (1976). In return for pleas of guilty to the first count (conspiracy to import) in this initial indictment, the government promised to drop the remaining counts and agreed to a probated sentence. Relying on this promise, appellants Ocanas, Garza, and de la Garza tendered guilty pleas, but the trial court did not accept the pleas when first tendered. The court took the pleas under

advisement, ordered presentence investigations, and set a date for sentencing. Prior to the date set for sentencing and prior to the trial court's acceptance of the guilty pleas, the government obtained a superseding indictment and filed a motion to dismiss the original. Record, vol. 1, at 7-8. The second indictment charged essentially the same offenses as the original indictment but expanded the time period of illegal activity and added some defendants. The trial court subsequently dismissed the first indictment, never having accepted the tendered pleas.

At a jury trial, appellant Casiano was acquitted of conspiracy to import, but convicted of conspiracy to possess and possession. Appellants Ocanas, Alvarado, Garza, and de la Garza were convicted on all counts. In appealing their convictions, appellants challenge the validity of the superseding indictment and the sufficiency of the evidence against them. They also contend that the trial court erred in admitting the testimony of coconspirator Benevides, in failing to hold a *James* hearing on the admissibility of certain coconspirators' statements, and in becoming directly involved in the prosecution of the case. Appellants Alvarado and Ocanas also contend that the trial court erred in denying their motion for severance.

For the reasons discussed below, we affirm the convictions.

1. The Superseding Indictment

This court previously decided that the superseding indictment did not place appellants in double jeopardy. *United States v. Garcia*, 589 F.2d 249 (5th Cir.) *cert. denied*, 442 U.S. 909, 99 S.Ct. 2821, 61 L.Ed.2d 274 (1979). We now find no merit in

the remaining challenges to that indictment.

Speedy Trial

[1,2] The indictment did not deny appellants their Sixth Amendment right to a speedy trial. That right comes into play only after indictment or arrest. *United States v. Marion,* 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). This indictment followed the first by less than five months. Although in some cases the Due Process Clause may require dismissal of an indictment when it is shown at trial that delay in bringing the indictment caused substantial prejudice to a defendant's right to a fair trial, *id* at 324; 92 S.Ct. at 465, appellants made no such showing, relying only on the possibility of prejudice inherent in any delay.

Basis for Indictment

[3-5] Appellants also complain that the government improperly secured the present indictment by using information obtained during the presentence investigation on the attempted guilty pleas to the charges alleged in the first indictment and information provided by a coconspirator named Benevides, which they contend was obtained in violation of their Sixth Amendment right to counsel.

As to the use of presentence investigation information, appellants rely on Rule 11 of the Federal Rules of Criminal Procedure, which provides that "evidence . . . of statements made in connection with, and relevant to, [pleas or offers of pleas] is not admissible in any civil or criminal proceeding against the person who made the plea or offer." Fed.R. Crim.P. rule 11

(e) (6).The government denies that any statements made in the course of plea bargaining or presentence investigation were used in preparing the second indictment or in presenting it to the grand jury, and appellants made no showing to the contrary. We therefore find no merit in this contention. [1]

[6,7] As to the use of information provided by Benevides, even assuming it was obtained in violation of appellants' Sixth Amendment right to counsel, its role in securing the present indictment provides no basis for finding that indictment invalid. An indictment valid on its face cannot be challenged merely because the grand jury acted on inadequate or incompetent evidence, or even on information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination. *United States v. Calandra,* 414 U.S. 338,345,94 S.Ct. 613, 618,

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1. We think that even if they had made such a showing, Rule 11(e)(6) would be inapplicable. The language of that rule contemplates and proscribes the improper use of evidence in a subsequent *adversary* proceeding, whether civil or criminal, *against* the individual who engaged in plea bargaining. A grand jury proceeding is not an adversary hearing to determine the guilt or innocence of the accused, but an *ex parte* investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person. *United States v. Calandra,* 414 U.S. 338, 343, 44, 94 S.Ct.613, 618, 38 L.Ed.2d 561 (1974). Appellants point out that we recently condemned the use of plea-related statements in *United States v. Geders,* 566 F.2d 1227 (5th Cir. 1978), *cert. denied,* 441 U.S. 922, 99 S.Ct. 2031, 60 L.Ed.2d 396 (1979). In *Geders,* however, the statements had been introduced at trial, not merely before a grand jury properly performing its investigatory function.

38 L.Ed.2d 561 (1974); *Lawn v. United States*, 355 U.S. 339, 349-50, 78 S.Ct. 311, 317-18, 2 L.Ed.2d 321 (1958).

The Plea Bargain

Appellants' final and most troubling challenge to the superseding indictment is that the government, by obtaining it, breached its plea bargain agreement. After careful consideration, we find no basis for granting relief.

Because a guilty plea waives constitutional rights, see *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969), the Supreme Court has held that a defendant is constitutionally entitled to relief when the state breaches a promise made to him in return for a plea of guilty, *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). The Court refrained from deciding exactly what remedy was constitutionally required, but did state "that when a [guilty] plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262, 92 S.Ct. at 499. *See also United States v. Shanahan*, 574 F.2d 1228, 1230 (5th Cir. 1978); *United States v. Grandinetti*, 564 F.2d 723, 725-26 (5th Cir. 1977).

We have previously suggested that a plea bargain is contractual in nature and that when the prosecutor breaches it the underlying basis for the plea fails. *Jones v. Estelle*, 584 F.2d 687, 689 (5th Cir. 1978); *Petition of Geisser*, 554 F.2d 698, 704 (5th Cir. 1977). We recognize that principles of contract law provide a useful analytical framework, but surely they

cannot be blindly incorporated into the criminal law in the area of plea bargaining. A direct application of contract law to the mutual promises in this case arguably dictates dismissal of those counts in the superseding indictment that correspond to the counts in the first indictment that the government promised to drop in return for pleas of guilty. We reject that result in favor of one more consistent with the just and efficient administration of criminal justice.

[8-10] The danger in a pure contractual approach to plea bargaining is that it may seduce one into thinking that the plea bargain involves only two parties, the prosecutor and the defendant, when in fact the trial court plays a critical role in the process. Plea bargaining is governed by Rule 11 of the Federal Rules of Criminal Procedure. Fed. R.Crim. P. rule 11, 18 U.S.C.A. Under Rule 11, the trial court clearly retains discretion in accepting or rejecting plea bargains. *United States v. Bean*, 564 F.2d 700, 702 (5th Cir. 1977); *see also United States v. Ellis*, 547 F.2d 863 (5th Cir. 1977). That a plea bargain will result in too light a sentence under the circumstances is a sound reason for a refusal to accept it. *United States v. Bean, supra*, at 704. Only in unusual circumstances will the rejection of a plea bargain be an abuse of discretion. *Id.*

[11,12] Thus, the realization of whatever expectations the prosecutor and defendant have as a result of their bargain depends entirely on the approval of the trial court. Surely neither party contemplates any benefit from the agreement unless and until the trial judge approves the bargain and accepts

the guilty plea. Neither party is justified in relying substantially on the bargain until the trial court approves it. We are therefore reluctant to bind them to the agreement until that time. As a general rule, then, we think that either party should be entitled to modify its position and even withdraw its consent to the bargain until the plea is tendered and the bargain as it then exists is accepted by the court.

We realize that appellants relied on the government's promise by tendering guilty pleas and submitting to extensive presentence investigations. A showing that the government gained some unfair advantage over them as a result of their reliance might have justified a departure from the general rule. But they offered no evidence that information provided by them in the course of plea bargaining and presentence investigation was used by the government either in obtaining the second indictment or at trial. On this record, we need not decide what sort of post-tender pre-acceptance conduct on the part of the prosecutor would warrant relief.

We find no merit in appellants' final challenge to the superseding indictment.

II. *The Testimony of Benevides*

Appellants contend that the trial court erred in refusing to exclude the testimony of Francisco Benevides, who had been a codefendant under the first indictment. Benevides participated in jury selection with appellants Casiano and Alvarado, and admitted being privy to confidential information. Record, vol. 3, at 77. Appellants claim that at the time he was

privy to this information he was in fact a paid government informant whom the government inproperly used as a spy in the defense camp, in violation of appellants' Sixth Amendment right to counsel. *See Weatherford v. Bursey,* 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977). The record, however, is wholly insufficient to permit us to rule on this point. Appellants rely on suspicion and inference, while the record reflects virtually nothing about the nature and extent of the relationship between Benevides and the government, about what information he may have gathered and transmitted, or about the role that information played at trial. We accordingly decline to rule on this point which appellants may raise in a 28 U.S.C. § 2255 petition. [2] *See United States v. Klein,* 546 F.2d 1259, 1262 (5th Cir. 1977).

III. *Severance*

Appellants Alvarado and Ocanas made a pretrial motion for severance on the grounds that other defendants had prior felony convictions which if presented to the jury would, they argued, prejudice their right to a fair trial. The trial court denied the motion and we affirm.

[13,14] Appellants made no effort to meet their burden of demonstrating the specific and compelling prejudice that would warrant our finding that the trial court abused its

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2. At oral argument, the government conceded that a § 2255 proceeding would be an appropriate way to resolve this issue. *See* Brief for Appellee, at 13-14.

discretion in denying a severance. *United States v. Wolford*, 614 F.2d 516, 518 (5th Cir. 1980); *United States v. Salomon*, 609 F.2d 1172, 1175 (5th Cir. 1980). Further, we doubt that such an effort would have been successful. Evidence of prior criminal offenses relating to a codefendant ordinarily will not generate prejudice arising to a level that requires severance. *See, e.g., United States v. Davis*, 546 F.2d 617, 620 (5th Cir. 1977); *United States v. Perez*, 489 F.2d 51,67 (5th Cir. 1973), *cert. denied*, 417 U.S. 945, 94 S.Ct. 3067, 41 L.Ed.2d 664 (1974).

[15] Appellants also claim on appeal that prejudice stemmed from the admission of evidence that appellant Garza attempted to steal a truck containing marijuana from the Department of Public Safety Office in McAllen, Texas, an offense extraneous to those for which appellants were indicted. We think that appellants' pretrial motion for severance neither embraced nor even contemplated the admission of this particular testimony. That motion was concerned only with the admission of evidence of prior felony convictions of certain codefendants, not with the admission of evidence of individual acts of particular defendants done in the course of this criminal enterprise. Record, vol. 1, at 678-79. Even assuming the issue is properly before us, we find that the trial court did not abuse its discretion in denying a severance.

IV. *Failure to Hold a James Hearing*

Appellants argue that the trial court committed reversible error by failing to hold a *James* hearing on the admissibility of certain coconspirators' statements. *United States v.*

James, 590 F.2d 575 (5th Cir.) (en banc), *cert. denied*, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979). We find no merit in this contention.

[16] Under *James*, a coconspirator's hearsay statement is not admissible unless the court determines that the prosecution has shown by a preponderance of the evidence independent of the statement itself that a conspiracy existed, that the coconspirator and the defendant against whom the statement is offered were members of the conspiracy, and that the statement was made during the course of and in furtherance of the conspiracy. 590 F.2d at 582; Fed.R.Evid. rule 801(d)(2)(E). Although the preferred order of proof requires the showing of the conspiracy and of the defendant's connection with it before admitting declarations of a coconspirator, when the trial court determines that it is not reasonably practicable to require the showing before admitting the statements, it may admit them subject to being connected up. 590 F.2d at 582. If the court subsequently concludes that the prosecution has not made a sufficient showing, the statements cannot remain in evidence, and the judge must decide whether any prejudice arising from the erroneous admission can be cured by a cautionary instruction to disregard the statement or whether a mistrial is required. *Id.* at 583. *See also United States v. Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978); *United States v. Stanchich*, 550 F.2d 1294, 1297-98 (2nd Cir. 1977).

[17] The trial court here specifically found the *James* requirements satisfied as to all defendants except

Casiano. Record, vol. 3, at 248-49. A review of the record supports that finding. The trial court also instructed the jury not to consider hearsay evidence against Casiano. Record, vol. 3, at 216. That evidence concerned a conversation that the witness had with appellant Garza regarding Garza's plan to steal a truckload of marijuana from the DPS office in McAllen. That plan was so unrelated to the offenses for which Casiano was convicted [3] that we fail to see how he could in any way have been prejudiced by the testimony. Under these circumstances, the trial court's instruction was more than sufficient to satisfy *James*.

V. Trial Court Involvement

On reviewing the record, we find absolutely no merit in appellants' contention that the trial judge became directly involved in the prosecution and thereby created an inference of guilt. We respond only to say that our brother on the district bench acted entirely properly in doing what he could to clear up what would otherwise have been ambiguous or confusing testimony and to expedite the trial. Neither the tenor nor the number of the questions he asked opens his impartial attitude to question. Further, he cautioned the jury not to draw any inferences from his comments or questions. *See United States v. Siegel*, 587 F.2d 721, 726 (5th Cir. 1979); *United States v. Davis, supra*, at 621-22.

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3. Casiano was convicted of both conspiracy to possess and possession of marijuana with intent to distribute it. *See* part VI *infra*.

VI. The Sufficiency of the Evidence

Appellants contend that the evidence is insufficient to support any of the convictions. We find no merit in this claim.

In General

[18] The simplest formulation of the standard of review is whether a reasonably minded jury must necessarily entertain a reasonable doubt as to the defendant's guilt under the evidence. *United States v. Slone*, 601 F.2d 800, 802 (5th Cir. 1979); *United States v. Caro*, 569 F.2d 411, 416 (5th Cir. 1978). In other words, the standard is whether reasonable minds could have found the evidence inconsistent with every reasonable hypothesis of the defendant's innocence. *United States v. Slone, supra* at 802-03; *United States v. Henderson*, 588 F.2d 157, 161 (5th Cir.), *cert. denied*, 440 U.S. 975, 99 S.Ct. 1544, 59 L.Ed.2d 794 (1979). We view all the evidence and inferences therefrom in a light most favorable to the government. *United States v. Thompson*, 603 F.2d 1200, 1204 (5th Cir. 1979); *United States v. Diecidue*, 603 F.2d 535, 543 (5th Cir. 1979), *cert. denied sub nom. Gispert v. United States*, –U.S.–, 100 S.Ct. 1345, 63 L.Ed.2d 781 (1980).

[19] The trial court took extensive notes during trial, and, before submitting the case to the jury, reviewed each count of the indictment, dismissing several for lack of proof. We have thoroughly reviewed the record, and, applying the appropriate standard, find that there is no question as to the sufficiency of the evidence against appellants Ocanas, Alvarado, de

la Garza, and Garza. The evidence against Casiano, however, warrants further discussion.

The Evidence Against Casiano

The evidence against Casiano established that a truck owned by him and containing a load of marijuana had been parked near the home of Jacinto Villarreal. Casiano arrived there, driving a pickup and accompanied by Octaviano Uresti. While Casiano waited in the pickup, Uresti instructed Villarreal to move the truck because someone had, in his words, snitched the load. Casiano then led Villarreal over to Genero Moreno's garage. Villarreal parked the truck and, at Casiano's instruction, joined Casiano in the pickup. Casiano then carried Villarreal over to Johnny's Hideaway.

[20] Casiano was convicted of both conspiracy to possess and possession of marijuana with intent to distribute it. The trial court denied a motion for acquittal based on insufficiency of the evidence. In reviewing the denial of that motion, we must determine whether, taking the view most favorable to the government, the jury could reasonably conclude that the evidence is inconsistent with any hypothesis of the accused's innocence. *United States v. Suarez*, 608 F.2d 584, 586 (5th Cir. 1979).

In *Suarez*, three defendants, upon learning that the Coast Guard had been called, voluntarily left the safety of a commercial fishing boat to return to a sinking vessel laden with marijuana. The sinking vessel then left the vicinity of other fishing boats that might have rendered aid pending the arrival

of the Coast Guard. We held that since the jury could reasonably conclude that all three defendants had to know of the marijuana on board the doomed boat, their voluntary return to it under the circumstances was "sufficient evidence to support the jury's conclusion that the defendants were in fact members of a conspiracy and had agreed to do something with the marijuana on board. . .." 608 F.2d at 587.

[21] We think *Suarez* is on point. The actions of Casiano, Uresti, and Villarreal in moving the truck to a more secure location demonstrate the same sort of group activity and voluntary cooperation as that in *Suarez*. The jury was thus entitled to infer that Casiano was in fact a member of a conspiracy that had agreed to "do something" with the truckload of marijuana, and we will not disturb that conclusion.

[22-24] Casiano also argues that mere ownership of a vehicle containing contraband is insufficient to constitute constructive possession. *United States v. Barrera*, 547 F.2d 1250, 1256 (5th Cir. 1977). We agree, but note that here the evidence shows more than mere ownership of the truck. Constructive possession need not be exclusive, but may be shared with others, *United States v. Stephenson*, 474 F.2d 1353, 1355 (5th Cir. 1973), as long as the evidence is such that a jury might reasonably infer that the person charged with constructive possession had dominion and control over the object, *United States v. Barrera, supra* at 1255. Villarreal had been instructed to follow Casiano in a truck that he knew belonged to Casiano. The jury could reasonably infer that Casiano enjoyed

dominion and control over the load.

VII. Casiano's Conviction and Sentence

[25,26] There is no inconsistency in Casiano's being found not guilty of conspiracy to import, yet guilty of conspiracy to possess and possession of marijuana. Even if there were, each count would be considered separately, and if a conviction on that count is supported by the evidence, it may stand. *United States v. Romeros*, 600 F.2d 1104, 1105 (5th Cir. 1979), *cert. denied*, – U.S. –, 100 S.Ct. 1025, 62 L.Ed.2d 759 (1980); *United States v. Gipson*, 553 F.2d 453, 457 (5th Cir. 1977). As we have already said, the evidence against Casiano supports both findings of guilty.

[27,28] Casiano also contends that by receiving consecutive sentences for conspiracy and possession he has somehow been punished twice for the same offense. It is beyond dispute, however, that conspiracy and the substantive offense that is the object of the conspiracy are separate and distinct crimes. *Iannelli v. United States*, 420 U.S. 770, 777-78, 95 S.Ct. 1284, 1289-90, 43 L.Ed.2d 616 (1975); *United States v. Romeros*, *supra* at 1105. The trial court could therefore properly impose consecutive sentences.

The judgment appealed from is AFFIRMED, without prejudice to appellants' right to seek 28 U.S.C. § 2255 relief.

No. 80-1308

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In the Supreme Court of the United States

OCTOBER TERM, 1980

NATIVIDAD OCANAS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
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Petitioners contend that the government improperly breached its plea agreement with them.

1. In September 1977, petitioners were indicted along with numerous co-conspirators in the United States District Court for the Southern District of Texas on charges of conspiracy to import marijuana, importation of marijuana, and conspiracy to distribute marijuana, in violation of 21 U.S.C. 963, 952(a), 846, 841(a), and 18 U.S.C. 2, respectively. Briefly summarized, the indictment alleged that the 30 individuals involved in the conspiracy floated bales of marijuana across the Rio Grande at a farm near Donna, Texas, transported them to a rented garage where they hid them in produce trucks, and shipped them to Oklahoma for sale to distributors (Pet. App. A-8).

Following the return of the indictment, the government promised to drop the remaining counts and agree to sentences of probation if petitioners would plead guilty to the count charging conspiracy to import. Relying upon this promise, petitioners Ocanas, Alvarado, Garza and de la Garza tendered guilty pleas on December 30, 1977.[1] The district court declined to accept their pleas, however. Instead, the court took the pleas under advisement, ordered presentence investigations, and set February 3, 1978, as the date for sentencing. We are informed by the United States Attorney's Office that, prior to the date set for sentencing, the court advised the prosecutors informally that it would not accept the plea agreement because it thought that sentences of probation were inappropriate in the circumstances of the case. Thereafter, on January 31, 1978, the government obtained a superseding indictment that charged essentially the same offenses as the original indictment but expanded the time period of the conspiracy by several months and added four defendants. On February 3, 1978, the district judge announced in open court that the guilty pleas would not be accepted, and all the defendants were allowed to withdraw their pleas (1 R. 141-143, 233-236). Petitioners were re-arraigned on February 10, 1978, and pleaded not guilty.

In late February 1978, petitioners filed motions to dismiss the indictment alleging that some of them had divulged incriminating facts to the probation officers conducting the presentence investigations and that this information had been improperly transmitted to law enforcement agents assigned to the case (1 R. 36-37, 45-46, 90-91, 104-105). Petitioners claimed that the prosecutors used this information to obtain the superseding indictment and that it should

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[1] Petitioner Casiano did not enter into a plea agreement (1 R. 92). "R." refers to the five volume record on appeal in the court of appeals.

therefore be dismissed. They also argued that the government had breached its plea bargain by filing the superseding indictment before the district court had accepted or rejected their pleas. At the hearing on petitioners' motion, however, the evidence showed that no "statements made in the course of plea bargaining or presentence investigation were used in preparing the second indictment or in presenting it to the grand jury" (Pet. App. A-11). Accordingly, the district court denied petitioners' motions to dismiss (I R. 233-236).

Thereafter, following a jury trial, petitioners were convicted on all counts of the superseding indictment (Pet. App. A-9).[2] The court of appeals affirmed, observing that petitioners had not been prejudiced by the aborted guilty plea proceedings before the trial court (*id.* at A-11, A-14). The court further explained that the district court had discretion to reject a plea bargain that would result in what it considered to be too light a sentence and that no abuse of that discretion had occurred in this case (*id.* at A-13 to A-14).

2. Petitioners' sole contention (Pet. 2) is that the government breached its plea bargain agreement by unilaterally withdrawing its consent to an unconsummated plea agreement. We agree with the court of appeals that, unless the government has gained some unfair advantage over the defendant because of his substantial, detrimental reliance on the plea agreement, the prosecutor may withdraw from a plea bargain until the agreement has been accepted by the district court. See, *e.g.*, Pet. App. A-14; *United States* v. *Calabrese*, Nos. 79-1388, 79-1390, 79-1392 (10th Cir.

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[2]Petitioner Ocanas was sentenced to concurrent five-year terms of imprisonment and a special parole term of four years on each of five counts. Petitioner Alvarado was sentenced to concurrent three-year terms of imprisonment and a special parole term of five years on each of three counts. Both petitioner Garza and petitioner de la Garza were sentenced to concurrent five-year terms of imprisonment and a special parole term of four years on each of eight counts.

Mar. 26, 1981), slip op. 20-21; *Roe* v. *United States Attorney*, 618 F. 2d 980, 982 (2d Cir. 1980); *Government of the Virgin Islands* v. *Scotland*, 614 F. 2d 360, 363-365 (3d Cir. 1980). But see *Cooper* v. *United States*, 594 F. 2d 12 (4th Cir. 1979). That issue, however, is not presented by this case. Rather, here the government sought a superseding indictment only after the district court rejected the plea agreement because petitioners, who were participants in a large-scale drug conspiracy, would have received inadequate sentences of probation.[3] As Rule 11(e)(4) of the Federal Rules of Criminal Procedure makes clear, the district court had discretion to reject a plea agreement that would result in an insufficient sentence. See, *e.g.*, *United States* v. *Bean*, 564 F. 2d 700, 702-704 (5th Cir. 1977). The court of appeals correctly concluded that the district court did not abuse its discretion under Rule 11(e)(4), and further review of that fact-bound question is unwarranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1981

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[3]Petitioners suggest (Pet. 2) that this Court should adopt a rule barring the government from withdrawing from a plea agreement in order to prevent the prosecutor from using "plea bargain statements to develop further indictments." In this case, however, the court of appeals determined that nothing in the record supports petitioners' contention that the government used any plea bargain statement to obtain or prepare the superseding indictment (Pet. App. A-11).